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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 915

BARBARA JUNE MUNCY AND CHARLES MUNCY,
Petitioners,

v.

GENERAL MOTORS CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit may be found in 367 F. 2d 493. The opinion of the Texas Court of Civil Appeals in *Muncy* v. *General Motors Corp.* may be found in 357 S.W. 2d 430.

JURISDICTION

The jurisdictional requisites for filing a petition for certiorari are adequately set forth in the Petition. Respondent denies that the Petition presents any of the grounds re-

quired by Rule 19-1(b) of this Court for the granting of a writ of certiorari.

QUESTION PRESENTED

The only question presented is whether a verdict for Respondent should have been directed in a jury trial when:

(a) Under Texas law, the design of the ignition switch was not defective as a matter of law; and,

(b) There was no evidence that the accelerator linkage was defective.

STATEMENT

Respondent respectfully suggests that the statement contained in the opinion of the Court of Appeals for the Fifth Circuit properly sets forth all of the relevant facts. 367 F. 2d 493; 495-96

The statement of the case set forth by Petitioners (Pet. 3-9) is misleading and incomplete in the following respects:

(1) The statement that "no occasion for floorboarding the accelerator had ever arisen" is inaccurate. (Pet. 4) Undisputed evidence showed that the accelerator was inspected during assembly and tested at full throttle when the automobile was completely assembled. (R. 893-96)

(2) The statement that Mrs. Lane was "misled into thinking that she had turned the ignition switch off" (Pet. 4) is an unsupported conclusion of counsel. Mrs. Lane stated that she "knew you had to turn the switch to turn it off" (R. 637-38); she knew that the ignition lock was designed so that the key could be removed without stopping the engine (R. 637); and she did not remember whether or not she had turned the switch. (R. 638)

(3) Mrs. Lane did not remember setting the emergency brake. (R. 630, 636)

(4) Mrs. Hudnall did not have the remotest idea of what she did or did not do in attempting to get out of the car (R. 679-91), as is so accurately summarized by the Fifth Circuit. 367 F. 2d at 496-97

(5) The dealer who sold the Chevrolet to the Lanes followed Respondent's check list in preparing it for delivery. (R. 997-1000; 1002) The only repairs after delivery and before the accident were to the hand brake and an adjustment to the carburetor idle. (R. 998)

(6) There was undisputed testimony that after the accident only body damage was repaired. (R. 1001-02)

(7) The Lanes encountered no problem with the carburetor or accelerator linkage after the idle adjustment was made by the dealer. (R. 638)

(8) The Record is void of evidence that the accelerator linkage was defective in either design or manufacture.

ARGUMENT.

No Grounds for Review Are Shown by Petitioners

The Petition does not present any special and important reasons for granting a writ of certiorari within the scope of Rule 19 of the Rules of this Court.

The decision of the Court of Appeals does not conflict, but rather is in harmony, with the decisions of other circuits, *e.g., Evans* v. *General Motors Corp.*, 359 F. 2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966); *Gossett* v. *Chrysler Corp.*, 359 F. 2d 84 (6th Cir., 1966). No state question has been decided in conflict with applicable state law, *e.g., Genell, Inc.* v. *Flynn*, 163 Tex. 632, 358 S.W. 2d 543 (1962); *Houston*

Lighting & Power Co. v. *Brooks*, 161 Tex. 32, 336 S.W. 2d 603 (1960).

No decision has been made regarding an undecided question of Federal law which has not been, but ought to be, settled by this Court; no decision has been made on a Federal question in conflict with applicable decisions of this Court; and no reason has been shown to call for an exercise of this Court's power of supervision, *e.g.*, *Moore* v. *Chesapeake & Ohio Ry.*, 340 U.S. 573 (1951); *Galloway* v. *United States*, 319 U.S. 372 (1943); *American Cas. Co. of Reading, Pa.* v. *Myrick*, 304 F. 2d 179 (5th Cir. 1962).

There is no showing by Petitioners that principles of importance to the public, as distinguished from the interest of the parties, are involved so as to meet the foregoing standards. *Rice* v. *Sioux City Memorial Parks Cemetery, Inc.*, 349 U.S. 70 (1955).

The Judgment of the Court of Appeals for the Fifth Circuit Is Correct

The ignition switch. The Court of Appeals for the Fifth Circuit properly held that the decision of the Texas Court of Civil Appeals in *Muncy* v. *General Motors Corp.*, 357 S.W. 2d 430 (Tex. Civ. App., 1962, no writ hist.) correctly states the law of Texas with respect to Petitioners' claim that the ignition switch on the 1960 Chevrolet was defectively designed. Since this case is a "diversity case," the Federal Courts are bound by Texas law. *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Petitioners assert that the Fifth Circuit gave *res judicata* effect to the decision of the Texas Court of Civil Appeals and that that decision "pronounced the law of Texas so as to deprive the Petitioners of a trial by jury on the merits." (Pet. 7, 17) The Court of Appeals properly held that the Texas decision was "not in any sense *res judicata*," but that it "clearly and correctly set forth

the principles which control the issue presented by the claim of a defective design of the ignition switch." 367 F. 2d at 496.

Petitioners cite no case, or other authority, which expresses a view contrary to the *Muncy* decision, *supra*, nor which questions the Texas Court in following the Restatement rule that:

> "A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured." 2 RESTATEMENT, TORTS § 395.

Unquestionably, Mrs. Lane did not use the Chevrolet in a manner and for a purpose for which it was manufactured. She ignored the "park" position of the gear shift lever. In violation of the law, she failed to set the parking brake and to turn off the engine.[1] This misuse, coupled with Mrs. Hudnall's negligence in exiting the automobile, caused Mrs. Muncy's injuries. Had Mrs. Lane availed herself of any of the safety devices, or had she turned the engine off, the accident would not have occurred — whether the key was in or out of the ignition lock. Mrs. Hudnall's negligence in exiting the Chevrolet, acting upon Mrs.

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[1] Article 6701d § 97, Texas Revised Civil Statutes states: "No person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine and effectively setting the brake thereon, and when standing upon any grade, turning the front wheels to the curb or side of the highway."

Lane's negligence, caused the car to become a "derelict" inflicting Mrs. Muncy's injuries.[2]

Petitioners attempt to equate this case with such cases as *Strakos* v. *Gehring*, ... Tex. ....., 360 S.W. 2d 787 (1962); *City of Austin* v. *Schmedes*, 154 Tex. 416, 279 S.W. 2d 326 (1955); *Kimbriel Produce Co.* v. *Mayo*, 180 S.W. 2d 504 (Tex. Civ. App., 1944, err. ref. w.o.m.) and *Reeves* v. *Tittle*, 129 S.W. 2d 364 (Tex. Civ. App., 1939, err. ref.) (Pet. 14-15) which are concurrent negligence cases. This argument of Petitioners completely misses the point that under the Restatement rule, as adopted in Texas and the Fifth Circuit, Respondent is not required to protect against bodily harm unless there is "lawful use in a manner and for a purpose for which it is manufactured." Petitioners concede that this is "the substantive law of Texas." (Pet. 14) Interpretation of cases such as *Strakos, supra,* in the way suggested by Petitioners would render Respondent liable for any injury that results from unintended, careless or negligent use of automobiles, simply because it is conceivable that persons may — and do — improperly use automobiles in a manner that results in injury and death.[3]

In Texas, "Liability for negligence rests primarily on reason to anticipate injury and failure to perform the duty

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[2] In *Rosner* v. *Harold Drilling Co.*, 261 S.W. 2d 190 (Tex. Civ. App., 1953, err. ref. n.r.e.), cited by Petitioners (Pet. 16), the Texas Court of Civil Appeals placed the responsibility for the runaway automobile squarely upon the shoulders of the driver This same result occurred in *Moody* v. *Clark*, 266 S.W. 2d 907 (Tex. Civ. App., 1954, err. ref. n.r.e.).

[3] Petitioners refer to the annual toll of injuries and deaths upon the nation's highways, especially as noted in hearings before the Senate Subcommittee on Executive Reorganization (Pet. 13 n. 9), and urge that this Court should prevent any "trend toward relieving automobile manufacturers of liability for mechanical and design defects." Respondent's duties and responsibilities are defined by law. This case should not be decided on Petitioners' assumption that such a trend exists or upon an emotional basis.

arising on account of such anticipation." *Genell, Inc.* v. *Flynn,* 163 Tex. 632, 358 S.W. 2d 543, 546-47 (1962). The "question is whether the injury, or a similar injury, might reasonably have been anticipated as a natural and probable result" of an ignition lock designed so that the key could be removed while the engine was running. *International-G.N. Ry.* v. *Lowry,* 132 Tex. 272, 121 S.W. 2d 585, 588 (1938).

Respondent was under no duty to make the Chevrolet "fool proof" and the nature of Respondent's duty is an issue of law for the Courts. *Evans* v. *General Motors Corp.,* 359 F. 2d 822, 824 (7th Cir.), *cert. denied,* 385 U.S. 836 (1966); *Kahn* v. *Chrysler Corp.,* 221 F. Supp. 677, 678 (S.D. Tex. 1963). The nature of such duty, as imposed by Texas law, was set forth by the Texas Court of Civil Appeals in *Muncy* v. *General Motors Corp.,* 357 S.W. 2d 430 (Tex. Civ. App., 1962, no writ hist.) and Respondent was found to have discharged its duty by that Court and the Fifth Circuit. The Chevrolet was safe for its intended use, therefore Respondent's duty was discharged. *Evans* v. *General Motors Corp., supra; Gossett* v. *Chrysler Corp.,* 359 F. 2d 84, 87 (6th Cir. 1966).

The accelerator linkage. No evidence was ever presented that the accelerator linkage on the 1960 Chevrolet was defective. The only reasonable assumption from what little evidence that was presented is that the engine must have started racing because Mrs. Hudnall depressed the accelerator pedal.

Petitioners' argument that there was evidence that the accelerator linkage was defective consists of four shreds: (Pet. 5-6)

1. Mrs. Hudnall had general soreness and some bruises after the accident.

2. The carburetor was idling high some weeks before the accident.

3. Inspections made by Respondent during the manufacturing process have on occasion revealed Chevrolets with an accelerator which stuck.

4. The accelerator linkage was designed with friction points.

Mrs. Hudnall's soreness and bruises could have been caused by the car's crash into the brick wall, as well as the causes attributed by Petitioners. Mrs. Hudnall's injuries are not conclusive evidence that she was not in fact "stomping" on the accelerator. (R. 606) The witness who assisted Mrs. Hudnall from the car testified that he ran up to the car and saw Mrs. Hudnall holding her hands in front of her face, screaming hysterically and "kicking her feet" up and down. (R. 599-600; 610-11)

Most important, however, is that none of this is evidence of a defect in the accelerator, that the defect was the result of negligence on the part of Respondent, or that there was any causal connection between the fact that, after the Lane automobile hit Mrs. Muncy and the building, the engine continued to roar as though "wide open." The more probable, and at least equally permissible, inferences are that the motor continued to run "wide open" because Mrs. Hudnall was holding it down or was stomping on it or because the car hit the building.

The positive evidence was that the dealer adjusted the carburetor (R. 998, 1005-6) and that there was no further problem with it. (R. 636; 638) Furthermore, following the accident, no repairs were made to the accelerator linkage. (R. 1001-02)

No evidence was developed that the Lane automobile was one of the few found during inspections to have a sticking accelerator. Positive evidence was put forth that the Lane Chevrolet, like all Chevrolets, was inspected and tested with the engine running wide open. (R. 893-96)

No evidence whatsoever was presented to show that an accelerator linkage with friction points was either improperly designed or defective.

From these circumstances, to allow the jury to speculate on (1) whether a defect existed, (2) whether it was caused by Respondent's negligence, and (3) whether it caused this mishap would be the very conjecture condemned by this Court. "This would be speculation run riot." *Moore* v. *Chesapeake & Ohio Ry.*, 340 U.S. 573, 578 (1951) (Pet. 12); *New York Central R. Co.* v. *Ambrose,* 280 U.S. 486, (1930); *Ford Motor Co.* v. *McDavid,* 259 F. 2d 261 (4th Cir.) *cert. denied,* 358 U.S. 908 (1958); *Smith* v. *General Motors Corp.,* 227 F. 2d 210 (5th Cir. 1955). This is also the Texas rule.[4] *Texas & P. Ry. Co.* v. *Brown,* 142 Tex. 385, 181 S.W. 2d 68 (1944); *Missouri P. Ry. Co.* v. *Porter,* 73 Tex. 304, 11 S.W. 324 (1889). As the Texas Supreme Court said in *Bowles* v. *Bourdon,* 148 Tex. 1, 219 S.W. 2d 779 (1949):

> " 'Where the proof discloses that a given result may have occurred by reason of more than one proximate cause, the jury can do no more than guess or speculate as to which was, in fact, the efficient cause, the submission of such choice to the jury has been consistently condemned by this Court and by other courts.' " (219 S.W. 2d at 785)

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[4] Contrary to Petitioners' assertion (Pet. 18), the Fifth Circuit specifically held that the Muncys failed to present evidence under the *Federal law* to take their claim to the jury. 367 F. 2d at 498. The Federal law and Texas law are the same in this respect.

The fact that the accident occurred is not evidence of a defect allowing the jury to speculate regarding the cause.[5] *Ford Motor Co.* v. *McDavid, supra; Smith* v. *General Motors Corp., supra; Ford Motor Co.* v. *Mondragon,* 271 F. 2d 342 (8th Cir. 1959); *General Motors Corp.* v. *Wolverine Ins. Co.,* 255 F. 2d 8 (6th Cir. 1958).

Petitioners cite cases in which this Court has held that the evidence presented required submission of the issues to the jury in order to preserve the party's right to a trial by jury. (Pet. 9-13; 18) Respondent can cite a contrasting group of cases in which this Court has held that it would be improper to submit the issues to the jury in view of the complete lack of evidence, since this would involve the "mischance of speculation over legally unfounded claims." *Brady* v. *Southern Ry.,* 320 U.S. 476, 480 (1943); *Moore* v. *Chesapeake & Ohio Ry.,* 340 U.S. 573 (1951) (Pet. 12); *Eckenrode* v. *Pennsylvania R.,* 335 U.S. 329 (1948); *Galloway* v. *United States,* 319 U.S. 372 (1943); *Ford Motor Co.* v. *McDavid,* 259 F. 2d 261 (4th Cir.), *cert. denied,* 358 U.S. 908 (1958); *Jamieson* v. *Woodard & Lothrop,* 247 F. 2d 23 (D.C. Cir.), *cert. denied,* 355 U.S. 855 (1957). This approach does not advance the argument.[6] The point remains that Petitioners failed to establish any evidence of negligence.

Absent some evidence that Mrs. Lane's Chevrolet was in some way defective, the District Court should have directed a verdict for Respondent. The Fifth Circuit Court of Appeals has corrected this error. 367 F. 2d at 498

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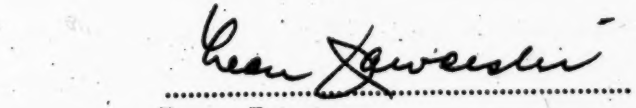
[5] The Fifth Circuit properly held that the doctrine of *res ipsa loquitur* did not apply to the facts of this case. 367 F. 2d at 498.

[6] Petitioners also claim that the decision of the Fifth Circuit "is of a piece with the attitude of appellate courts" in F.E.L.A. cases prior to 1943. This assertion that there is some attitude of "curtailment of trial by jury" prevalent among the Courts of Appeals need not be answered. (Pet. 12)

CONCLUSION

For the foregoing reasons, Respondent respectfully suggests that certiorari should be denied.

Respectfully submitted,



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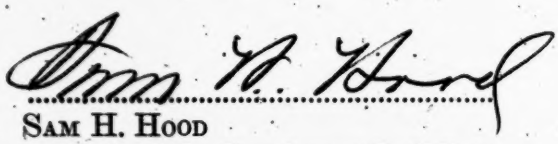
CERTIFICATE OF SERVICE

I, Sam H. Hood, one of the attorneys for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of January, 1967, I served the foregoing BRIEF OF RESPONDENT IN OPPOSITION to the PETITION FOR WRIT OF CERTIORARI pursuant to Rule 33 by depositing two envelopes containing one copy each in a United States mail box, with first class postage prepaid, addressed respectively to Mr. Franklin Jones, P. O. Drawer 1249, Marshall, Texas, and Mr. William Hurwitz, 1021 First National Bank Building, Longview, Texas, attorneys for Petitioners.



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